

A POLITICAL AND CONSTITUTIONAL REVIEW OF *UNITED STATES v. NIXON*

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I. INTRODUCTION

In the summer of '71, it was the Pentagon Papers case¹ that dramatized the claims of Richard Nixon in the Supreme Court of the United States. In the summer of '74, it was *United States v. Nixon*.² Politically, the realignment of the President from plaintiff to defendant said more than anything else about what had happened in the meantime: from the party on whose behalf the "United States" had gone to court in 1971, to the party against whom the "United States" was seeking judicial assistance in 1974.

Indeed, it is really in the political symbolism of the two cases that their greater significance may be found, for each, albeit in a different way, was something of a constitutional anti-climax. Each entered the Supreme Court on expedited review. Each was publicized as framing a question of grave constitutional significance. In each, the Supreme Court rejected Mr. Nixon's extraordinary view of executive power—but on such closely qualified grounds as scarcely to disturb any precedent or to cause any ripple in constitutional theory.

In the Pentagon Papers case, the outcome turned on a finding that Congress had not deemed it necessary to safeguard classified information by the additional means of authorizing prior restraint of newspaper publication through executive application for federal court injunctions; thus there was no statutory basis for the relief the President had sought. The case was doubtless significant in not accepting a more permissive view of the executive interest, but in no sense can it be said to have belittled the executive power as that power was understood the day before the decision came down. In that respect, the case was a constitutional anti-climax.

In *United States v. Nixon*, the outcome turned upon a close and conscientious assessment that likewise cannot be said to have

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¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

² 94 S. Ct. 3090 (1974).

diminished the executive power as it had previously been understood. On the one side there was the particularity of the Special Prosecutor's subpoena, the *prima facie* relevance and admissibility of the material he sought, and the lack of alternative means to satisfy his need adequately to prepare for a scheduled federal criminal trial in which it would be his burden to establish each element of the several felony offenses beyond reasonable doubt. On the other side, there was the unqualified refusal by the President to yield the material even for *in camera* examination³ by the district judge who might thereafter preserve the confidentiality of some or all of it, after assessing the possibility that its prosecutorial importance should be subordinated to executive interests that might somehow be compromised by its trial use. Essentially, acceptance of the executive claim at that stage would have been tantamount to the abdication of judicial review since the court was asked to uphold the claim of privilege without opportunity to examine the material itself. The refusal to acknowledge any larger role for the judiciary was pressed in these nearly absolute terms, moreover, even though it was not alleged that interests of national security or of foreign relations were in any way involved.

It was realistically not surprising, therefore, that the Supreme Court would reject the claim of executive privilege under the circumstances, even while acknowledging the legitimacy of executive concerns and making provision for the protection of the material during the time that the district court would have it to examine. The opinion by the Chief Justice is exceptionally restrained and deferential, and the holding is a narrow one. Like the Pentagon Papers case, *United States v. Nixon* is doubtless significant in not accepting a more permissive view of the executive power, but in no sense can it be said to have belittled that power.

If there is error in the opinion on the issue of executive privilege, it may not have been in the outcome of the case, but only in the largesse of certain dicta. Not since Chief Justice Vinson's opinion in *United States v. Reynolds*,⁴ which drew a sharp dissent by Justices Jackson, Frankfurter, and Black, had the Court issued an oblique invitation to the President to throttle judicial review by presenting a claim of executive privilege in the cellophane wrapper of "national security." Yet, here it is again, in *United States v. Nixon*, as a negative pregnant:

Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept

³ Respondent's Brief at 72-82, *United States v. Nixon*, 94 S. Ct. 3090 (1974).

⁴ 345 U.S. 1 (1953).

the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection⁵

The reiteration from *Reynolds* was unnecessary. It is surprising that it drew no disclaimer from any other Justice. Ironically, it may even imply that Mr. Nixon would have prevailed in the case had he once again incanted the magical words of "national security."

Similarly, while I agree with the view that executive privilege may well have "constitutional underpinnings" as suggested by the Court in *United States v. Nixon*,⁶ Chief Justice Burger's footnoted reference to *McCulloch v. Maryland*,⁷ in support of that observation, may need heavy qualification. Otherwise the reader might reasonably suppose that the Chief Justice meant that the President possesses a general grant of implied, incidental power (including that of confidentiality) fully as broad as what the necessary-and-proper clause commits to Congress by express provision, rather than that the President may necessarily possess some essential but very narrow zone of implied power without which he would be quite unable to perform his express duties at all.

But surely the reference to *McCulloch v. Maryland* did not mean to read into article II an implied equivalent of the necessary-and-proper clause which is found only in article I. Indeed, the necessary-and-proper clause in article I itself forbids any such inference to be drawn from the silence of article II. Thus, the clause provides in full (and note particularly the second half of the clause):

[Congress shall have power] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁸

It would appear to be plain from this provision that insofar as some larger zone of executive privilege might *by Congress* be deemed appropriate and expedient for the President to have, more generous by far than what a court would regard as a minimal privilege indispensable to the performance of the President's express constitutional powers (*e.g.*, a privilege of confidentiality respecting specific troop locations during a time of military emergency as an indispensable incident of his express power as Com-

⁵ 94 S. Ct. at 3107 (emphasis added).

⁶ *Id.* at 3106.

⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁸ U.S. CONST. art. I, § 8, cl. 18.

mander in Chief), the necessary-and-proper clause permits Congress to provide for that more generous zone of privilege. But precisely because the Constitution expressly commits all such questions of executive convenience and expediency solely to Congress and leaves nothing to inference or implication from the silence of article II, there is no room left for any court to analogize any broadly implied power of executive privilege from article II itself.

I have no doubt, however, that others contributing to this symposium will write at greater length on the Supreme Court's treatment of the executive privilege claim, and as I am troubled by that treatment only in respect to its *dicta*, in this Article I think it useful to concentrate on two other matters. The first of these is to distinguish *United States v. Nixon* from any other case in recent Supreme Court history by noting the utterly remarkable political effects of its most minor features. Essentially, these are the effects which I believe sprang at once from the timing, the unanimity, the inescapable aptness of its reasoning to the concurrent impeachment hearings, and from the fortuitous result of the very last sentence in the case. To be sure, this is not a conventional academic critique, and much of it is already an obvious fact of public understanding. Still, the connections of these enormous political events with what might otherwise properly be regarded as an unremarkable case on executive privilege deserve to be chronicled while they are still fresh.

The second matter is well within the field of academic critique, however, even though it, too, may bear profoundly on the long term political effects of this case. I mean to address the manner in which the Supreme Court presumed to affirm the issuance of judicial process⁹ to assist a purely executive function in spite of the President's clear manifestation to the district court that, as President, he did not desire that assistance. There is reason to be concerned that *United States v. Nixon* may be seen as a case which implicitly acknowledges in Congress some power to "particle-ize" the executive power of the United States, and I do not think that suggestion should be allowed to pass without extended comment.

In this respect, I especially regret that this symposium will not have the benefit of the separate views of Professor Alexander Bickel,¹⁰ and of course I have no idea whether he will find my own

⁹ 94 S. Ct. at 3100-02.

¹⁰ See Bickel, *On Mr. Jaworski's Quarrel with Mr. Nixon*, N.Y. Times, May 23, 1974, at 39, col. 1 (city ed.), and *id.*, June 3, 1974, at 30, col. 3 (city ed.). Compare the views of Professor Paul Bator, *Disputing Mr. St. Clair on the Jurisdictional Issue*, N.Y. Times, May 30, 1974, at 37, col. 1 (city ed.). See also Albert & Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski's Authority*, 74 COLUM. L. REV. 545 (1974).

approach at all acceptable. But the question is an important one, and I am convinced that the Supreme Court failed to appreciate the full implications of what appeared at the time as a perfectly ordinary matter of "standing" and "justiciability."

II. THE POLITICAL CONSEQUENCES OF *United States v. Nixon*

A. *The "Puzzling" Unanimity of the Result and of the Absence of Separate Opinions*

Unanimity of decision in this case, unaccompanied by even separate concurring opinions, is superficially very odd. It seems doubtful that there could have been no seriously different shades of opinion within this Nixon/Warren Court on any of the several questions which were examined. As a suggestion that the sole opinion by the Chief Justice ought not necessarily be read as the exact expression of each member of the Court in any future consideration of those issues, it may be well to look very closely at the circumstances of the case to remember what overriding reason might have persuaded the several Justices to forego the value of any separate opinions.

In the Pentagon Papers case, an equivalent testing of judicial views respecting the scope of executive powers, the Court was divided among the maximum number of possible opinions: nine. In *United States v. United States District Court*,¹¹ an equivalent testing of judicial views respecting executive exemption from the restraints of the fourth amendment, the Court reflected four different views even in reaching unanimity on the outcome. Even without more,¹² the appearance of but one opinion, by the Chief Justice for the entire Court, had all of the political earmarks of what had seldom been achieved since the circumstances of *Brown v. Board of Education*¹³ twenty years before.

It was to be expected that one or another Justice (including the Chief Justice) was reasonably likely to dissent merely on procedural grounds and to declare that the case should not have been heard at this time on the merits.¹⁴ They might have done so either because: (a) the order by Judge Sirica was not technically

¹¹ 407 U.S. 297 (1972).

¹² *E.g.*, the very day following the release of *United States v. Nixon*, the Court issued its decision in the Detroit School Case (*Milliken v. Bradley*, 94 S. Ct. 3112 (1974)), dividing five to four, with five separate opinions.

¹³ 347 U.S. 483 (1954).

¹⁴ Compare the Chief Justice's opinion in *New York Times Co. v. United States*, 403 U.S. 713, 748 (1971), with that in *Laird v. Tatum*, 408 U.S. 1 (1971), and his agreement with the action of Justice Marshall in *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973).

a "final" one; or (b) the court of appeals had not reviewed the case, or, more plausibly, (c) a decision at the moment might necessarily have some untoward consequences in the impeachment proceedings of the House of Representatives, no matter what the Court might do in attempting to limit a decision on the merits.¹⁵ Those "political" effects would be avoidable simply by holding the case over until the next October term (or by remand to the court of appeals), without serious possibility of prejudice to the scheduled trial of September 9, 1974,¹⁶ which could readily be continued. Not weighty objections, perhaps, but not more frivolous than what had been persuasive to some in the Pentagon Papers case.

Similarly, one might have expected one or more Justices (again including the Chief Justice) to be agreeable to Mr. St. Clair's additional argument that the Special Prosecutor's interest was inadequate, since the interest he represented was solely an executive one to which the President had asserted his superior authority as Chief Executive.¹⁷ Plainly the President had made manifest to the district court that he did not wish the assistance of judicial process to secure certain evidence for prosecutive use, an interest which the Court itself acknowledged to be exclusively executive.¹⁸ The criminal defendants' claims had not been passed upon by the district court, and they were not parties in the case before the Supreme Court. Therefore, as between the only parties who were in court there was no equality of authority in presuming to say whether the executive interest of the United States would be better served if the court would decline to issue a subpoena than if it would agree to issue the subpoena. Obviously, the court should have deferred to the superior executive authority of the President of the United States: The President had made plain that he did not believe any executive interest would be advanced by issuance of the subpoena, and there simply was no other interest whatever to serve as a basis for issuing that subpoena.

Viewed in this manner, the issue was not at all whether the President (or the Attorney General) might delegate some portion of the executive power. Without denying in the least that elements of that power might be delegated (whether to promote the appearance of justice, to mollify Congress, or simply on grounds

¹⁵ See Record at 51, 55-56 (argument of Mr. St. Clair), *United States v. Nixon*, 94 S. Ct. 3090 (1974) [hereinafter cited as Record].

¹⁶ *United States v. Mitchell*, (Crim. No. 74-110 D.D.C. filed Mar. 1, 1974).

¹⁷ See Record, *supra* note 15, at 62-65 (argument of Mr. St. Clair).

¹⁸ 94 S. Ct. at 3101.

of executive expediency), the existence of an outstanding and unrevoked agency is in no sense inconsistent with the executive superiority of the President when a district court is confronted with conflicting assertions of what constitutes *the* executive interest in a given case. Does the President have a superordinate authority definitively to assert the executive interest of the United States in its own courts, or does he not? Implicit in the Supreme Court's decision is the conclusion that "he does not," but rather, that he must instead either attempt to "revoke" the authority of the Special Prosecutor or to fire him outright. Why that should be so (and nothing provided by the cases cited by the Court supplies an answer), however, goes wholly unexplained.¹⁹ One might very well have expected at least a clarifying concurring opinion, if not an outright dissent.

On the other side, *i.e.*, insofar as the Chief Justice's sole opinion for the Court was more favorable to the "constitutional underpinnings" and the scope of executive privilege than one would think could honestly command the uniform agreement of all of the Justices,²⁰ this, too, might have been expected to draw disclaimers in separate opinions. And while each of these reasons is itself speculative, it is clear that the unanimity of the opinion *was* exceptional in light of the divisions which have so frequently riven the Nixon/Warren Court.

The opinion in *United States v. Nixon* suffers intellectually from the fact of that unanimity in many of the same ways as *Brown v. Board of Education*²¹ in which the Supreme Court may have willingly composed its marginal differences two decades ago. Once agreement on the merits of the basic issue was reached (as I do not doubt that it was), there was a very compelling reason to forego individual expressions of marginal difference in the common interest of sustaining the Supreme Court itself as an institution and to minimize the risk of noncompliance with its decision.

That risk was not trivial and therefore it was not necessarily wrong for the Court to proceed as it did. My point is only that one

¹⁹ For obvious reasons the President might not wish to fire a subordinate, or otherwise to revoke his general agency, and the President may in some measure even be restrained by an Act of Congress from doing so insofar as the power of removal or revocation cannot themselves be said to be indispensable to the exercise of presidential executive supremacy. Precisely because that is so, however, neither is it at all clear why anyone would think that the power of presidential executive supremacy could *only* be asserted by discharge or by revocation, rather than directly, by a personal and direct manifestation of the President's will in the district court itself. See section III of this Article, *infra*.

²⁰ See text accompanying note 6 *supra*.

²¹ 347 U.S. 483 (1954).

may recognize the circumstances of the case and, accordingly, not regard its every phrase as the last possible word on the subject. Not only had much been made in the popular press of the President's pregnant refusal to affirm his earlier statements that he would abide by a "definitive" holding, and of the stoic silence of Mr. St. Clair in declining comment on what response the President might make in the event of an adverse ruling by the Supreme Court, but there was the following delicate exchange in the course of the oral argument itself:

Question: You are submitting the matter to this Court—

Mr. St. Clair: To this Court under a special showing on behalf of the President—

Question: And you are still leaving it up to this Court to decide it.

Mr. St. Clair: Yes, *in a sense*.

Question: In what sense?

Mr. St. Clair: In the sense that this Court has the obligation to determine the law. *The President also has an obligation to carry out his constitutional duties.*

Question: Well, do you agree that that is what is before this Court, and you are submitting it to this Court for decision?

Mr. St. Clair: This is being submitted to this Court for *its guidance* and judgment with respect to the law. The President, *on the other hand*, has his obligations under the Constitution.

Question: Are you submitting it to this Court for this Court's decision?

Mr. St. Clair: As to what the law is, yes.²²

It may be doubtful, of course, whether the President actually would have declined to comply with the decision even had it been supported by a less impressive vote, or even had it come with some concurring opinions disclaiming agreement with the opinion for this Court. On the evening of July 24th, following public release of the decision, the first political effect took hold. Mr. St. Clair announced that the President intended to comply "fully" with the decision. The unanimity of the Court and the absence of separate opinions, achieved at some cost to a fuller examination of the issues, helped to insure that this would be so.

B. *The Conjunction of Timing, Unanimity, and Ratio Decidendi, and Their Impact upon the Impeachment of the President*

Within one week of the decision, the *ratio decidendi* of the Supreme Court's opinion had contributed significantly to two parts of the House Judiciary Committee's proposed articles of

²² Record, *supra* note 15, at 60-61 (emphasis added).

impeachment as well, in my view, as influencing the overall mood of the Committee's deliberations. Mr. St. Clair's prophecy²³ that these kinds of effects would be inevitable if the Court were not to postpone the decision, or remand the case, was fulfilled.

To be sure, even prior to the decision there was a faint possibility that the House Committee, having declined to press its own subpoenas against the President through the courts, might nonetheless presume to characterize his resistance as itself a "high crime" or "misdemeanor." Without the benefit of the powerful analogical reasoning provided by *United States v. Nixon*, however, it was at best a remote possibility: The presumption of the House to resolve a conflict of constitutional claims in its own favor and to impeach a President simply for the view he took of the law is too reminiscent of the abortive impeachment of Andrew Johnson to suppose that it would have carried very far. Nevertheless, within a week of the Supreme Court's unanimous opinion in *United States v. Nixon*, the possibility was twice realized.

The second most senior Republican member of the Committee (McClory of Illinois) personally sponsored an additional article of impeachment, based solely upon the President's untested claim. The article charged that the President, "willfully disobeyed" the legitimate processes of the Committee, "interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives," and thereby committed an impeachable offense.²⁴

Earlier, moreover, in the course of considering the first proposed article of impeachment (the coverup, "obstruction of justice" article), Congressman Danielson of California proposed an amendment related to the same subject. The theory of his amendment was that the President's continuing resistance to the Committee's subpoenas was not even in good faith; that it was, rather, an additional means by which the President sought to conceal the criminal wrongdoings of his own agents and advisors.²⁵ It is difficult to imagine that either the Danielson amendment or the separate McClory article of impeachment (which carried by the narrow margin of twenty-one to seventeen) would have been adopted without the encouragement that *United States v. Nixon* implicitly provided. The decision simply destroyed whatever strength the President's claim to resist the Committee previously possessed and made it inexplicable that he would still persist.

Prior to the decision, the President's claim of absolute ex-

²³ *Id.* at 55-56 (argument of Mr. St. Clair).

²⁴ N.Y. Times, July 31, 1974, at 1, col. 7 (city ed.).

²⁵ *Id.*, July 28, 1974, at 34, col. 4 (city ed.).

ecutive privilege already appeared weak against the extraordinary and unique authority of the impeachment power, the explicit constitutional agency of executive accountability for "high crimes" or "misdemeanors"—weaker, indeed, than his claim against the more limited responsibilities of the Special Prosecutor. Following the decision, it required no extravagant analogical fancy to appreciate the manner in which the President's claim against the impeachment discovery powers of the House of Representatives had been diminished to the vanishing point, no matter how circumspectly the Court itself might disavow any expression about that separate controversy.

That point had been made in the course of the oral argument in *United States v. Nixon* itself,²⁶ indicating the hopelessness of Mr. St. Clair's task of claiming absolute privilege both in the courts and in Congress. In the course of that argument, Mr. St. Clair was obliged to argue that the fact that the federal grand jury had named the President as an unindicted co-conspirator should be disregarded entirely by the Court in determining whether executive privilege would apply to withhold the sixty-four subpoenaed tapes from the Special Prosecutor—that it could not be used to diminish the presumption that the claim of privilege was appropriate and made in good faith because it was improper for a federal grand jury to identify the President as a criminal co-conspirator. Specifically, Mr. St. Clair observed: "[T]he President we suggest cannot be indicted, cannot be named as a co-conspirator because that is an assumption of a legislative function under the Constitution."²⁷ What "legislative" function of criminal accountability was it that the grand jury thus presumed to usurp? Obviously, said Mr. St. Clair, "that the process that is available . . . is *the process of impeachment*."²⁸

Moments later, in the course of the same argument (portions of which were carried in the newspapers and later referred to by members of the Judiciary Committee), the awkwardness of Mr. St. Clair's position that executive privilege is absolute against the Special Prosecutor and equally absolute against the impeachment discovery power of Congress became apparent in the following embarrassing exchange:

Question: How are you going to impeach him if you don't know about it? [*i.e.*, if Congress is also barred by executive privilege from securing the necessary evidence of presidential wrongdoing].

Mr. St. Clair: Well, if you know about it, then you can state the case. If you don't know about it, you don't have it.

²⁶ Record, *supra* note 15, at 107-08.

²⁷ *Id.* at 89.

²⁸ *Id.* at 90 (emphasis added).

Question: So there you are. You're on the prongs of a dilemma; huuh?

Mr. St. Clair: No, I don't think so.

Question: If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way; you can't impeach him, so you don't impeach him. You lose me some place along there.

[Laughter.]²⁹

Only the emphasis has been added to this excerpt from the transcript of oral argument. The transcript itself reports the "laughter." The point could hardly have been lost on the House Judiciary Committee's thirty-eight lawyer members sixteen days later when the Court's unanimous decision came down as the Committee was meeting for the first time in public session to consider its own case.

Circumspect as the opinion was, moreover, its own applicability to impeachment, by analogy, was unavoidable. To be sure, the Court noted that not even the Special Prosecutor would necessarily receive all of the tapes he had subpoenaed;³⁰ it affirmed Judge Sirica only insofar as the District Court could examine the materials *in camera*, with due regard to any particularized claims of privilege as to specific portions, as against the Special Prosecutor's alleged trial needs. It also took the unusual precaution of adding a section to its opinion (section "E") reminding the district judge of "his responsibility to see to it that until released to the Special Prosecutor no *in camera* material is revealed to anyone."³¹ The Court explained the propriety of this procedure with a reference to *Marbury v. Madison*;³² "[i]t is emphatically the province and duty of the judicial department to say what the law is,"³³ a remark that would encourage some members of the House Judiciary Committee to object to the McClory article.³⁴ The Committee had *not* submitted its claim against the President to the courts but was, rather, presuming itself to "say what the law is."³⁵

²⁹ *Id.* at 108 (emphasis added).

³⁰ 94 S. Ct. at 3110.

³¹ *Id.* at 3111.

³² 5 U.S. (1 Cranch) 137 (1803).

³³ *Id.* at 177.

³⁴ N.Y. Times, July 31, 1974, at 14, col. 3 (city ed.).

³⁵ The presumption of the Judiciary Committee, to resolve its own constitutional claim in its own favor and to characterize the President's persistence in maintaining his own view as a "high crime" or "misdemeanor," may have disturbing consequences especially since the proposed third article of impeachment does not allege that the President's claim was made in bad faith. Unlike the Danielson amendment to the proposed first article of impeachment, it characterized the President's resistance per se as a "high crime" or "misdemeanor."

Even so, other portions of the decision furnished considerable justification for the Committee's majority view, especially against the background of the oral argument. The Court had, for instance, come down heavily against a claim of absolute executive privilege "when the privilege depends solely on the broad, undifferentiated claim of public interest."³⁶ The claim the President had made in resisting the Judiciary Committee's subpoenas was exactly of the same kind—a broad, undifferentiated claim of public interest. The Court had also stressed the "impediment that an absolute unqualified privilege would place in the way" of a criminal prosecution.³⁷ The dictum applies with at least equal force to the impediment the President's claim placed in the way of the Judiciary Committee proceeding, the proceeding which Mr. St. Clair himself had said was the exclusive proper mode of determining presidential criminality. Moreover, the Supreme Court noted: "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."³⁸ How obtuse it would be not to see at once that, "to ensure that justice is done, it is [equally] imperative to the function of [the impeachment power] that compulsory process be available" to the House Judiciary Committee when it is acting under that unique authority.

Thus, the opinion did indeed fortify the resolve of the Judiciary Committee and lent credence to its view; its own omission to have its own claim tested in the courts was brushed aside. In this additional way, the timing, unanimity, and *ratio decidendi* of *United States v. Nixon* compounded the difficulties the President was already facing in Congress.

C. "The Mandate Shall Issue Forthwith"

"Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith."³⁹ This last sentence, concluding the opinion in *United States v. Nixon*, seems utterly unnoteworthy. Yet, because of the sequel of events that fortuitously resulted from its issuance, the sentence must hold our attention in completing a description of the political effects of this case. To be sure, the effects of this bit of the case are less

My own reservations to the precedential effect of what the Committee presumed to do in this respect appear in the October, 1974, issue of the A.B.A. Journal.

³⁶ 94 S. Ct. at 3107.

³⁷ *Id.*

³⁸ *Id.* at 3108.

³⁹ *Id.* at 3111.

certain than any of the others, because their connection depends upon inferences that must be drawn from facts that are still very sketchy. A better history may need the personal memoirs of the Justices, of Judge Sirica, of Mr. St. Clair, and of Richard Nixon. But even this resumé would be incomplete if it did not recall the impact of the Court's order as it has been felt even now.

It is not common that Supreme Court decisions conclude by laying down an order for an immediate mandate to issue, nor was it a foregone conclusion to suppose that the Court would do so in this instance. Again, there is the point that the proceedings in Judge Sirica's court might have an avoidable effect on the House proceedings, and for this reason the Court might not compel immediate disclosure. And while expedited review of the case may itself have been exactly right (the Court is surely persuasive that a President ought not have to be placed in contempt as a condition of having his constitutional claim tested in the Supreme Court, and the court of appeals had already issued a set of opinions on the merits of his claim earlier in *Nixon v. Sirica*⁴⁰), there was now, as of July 24, 1974, no similar urgency to hasten the district court proceeding.

It was true that the trials of Mitchell, Haldeman, Ehrlichman, Strachan, Parkinson, and Mardian had been previously scheduled for September 9th. But the climate of immediate publicity, the likelihood of motions for postponement (which were subsequently made and refused, the trial date being finally confirmed for the end of September), plus Mr. St. Clair's previously announced view that it would require a great deal of time to review the materials to particularize specific objections,⁴¹ all might have been weighed the other way. The narrow needs of justice did not self-evidently require that the September 9th trial date be cast in concrete. If one were indifferent to the political desirability of winding up Watergate as expeditiously as possible to relieve the general public anxiety and the immense distraction it had brought within Congress and the Presidency, it would be difficult to isolate the representations of the Special Prosecutor sufficient to persuade the Court that "time is of the essence." Certainly they are not noted in the opinion.

Be that as it may, the mandate did issue forthwith, and within a week Judge Sirica established a timetable for submission of the materials. More significantly, as it turned out, he also required Mr. St. Clair personally to participate in the review of the tapes⁴²

⁴⁰ 487 F.2d 700 (D.C. Cir. 1973).

⁴¹ N.Y. Times, July 10, 1974, at 1, col. 6 (city ed.).

⁴² *Id.* July 27, 1974, at 1, col. 6 (city ed.).

—possibly from the judge's frustration at his inability to do anything about two previously nonexistent tapes and an eighteen minute gap in another which a panel of experts had advised him was the result of several hand erasures. The insistence upon Mr. St. Clair's personal review might have been an appropriate precaution, to make more certain than otherwise that Mr. St. Clair could, of his own personal knowledge, subsequently report whether all of the material subject to the Supreme Court's mandate was included in the submission to the district court.

On Monday, August 5th, the full consequences linked with these quickening developments became apparent when the President admitted that he had previously misstated the extent of his knowledge of the Watergate burglary, that he had in fact attempted to impede the F.B.I. inquiry, and that he had knowingly withheld this information from the House Judiciary Committee as well as from his own counsel, contrary to his numerous earlier public statements.⁴³ A story in the Washington Post the following day ventured an explanation for the President's wholly unexpected, and fatal, admission.⁴⁴ Claiming access to information from a suitably knowledgeable source, the story asserted that Mr. St. Clair had listened to a tape establishing these devastating facts. Resolving his ethical and legal responsibilities appropriately, Mr. St. Clair had allegedly advised the President that he would be forced to resign and to advise the district court of the truth of the matter, to avoid complicity in any continuing misrepresentation.

The immediate effect on the impeachment proceedings (all previously dissenting members on the obstruction of justice article now came over), in the House, in the Senate, and on the President himself, is itself already history and there is surely no point belaboring it. Rather, what may be more appropriate here is simply to note how different one's assessment of an unprepossessing decision in the Supreme Court may be, depending upon the interest one may have in understanding it.

United States v. Nixon is not a remarkable case doctrinally. It breaks no new ground in the judicial review of executive privilege, and presumably will not be featured more than any of the other cases where the exceptional executive claims of Mr. Nixon (e.g., impoundment, surveillance, prior restraint on news publication) were turned aside without, however, significantly cutting back on any established doctrine of executive power. It is certainly not more noteworthy in its treatment of executive privilege,

⁴³ *Id.*, Aug. 6, 1974, at 1, col. 4 (city ed.).

⁴⁴ Washington Post, Aug. 6, 1974, at 1A, col. 5.

for instance, than *Burr*⁴⁵ or than *United States v. Reynolds*.⁴⁶ To say that is was therefore not an important case, however, is to miss the larger point entirely. It is in the explanation of its most modest legal peculiarities that the most interesting questions are found. The decision's Marshallian unanimity, its timing, its oblique encouragement to the impeachment proceedings, and even its concluding phrase (that "the mandate shall issue forthwith") significantly contributed to the first resignation of a President. It was, for all those reasons, truly an historic case.

III. THE IRONY OF *United States v. Nixon* AS A GREAT CASE

Virtually every student of constitutional law has had to come to terms with the realization that great cases are sometimes made so in spite of themselves. By far the most famous example is *Marbury v. Madison*,⁴⁷ in which Chief Justice Marshall authoritatively settled the Supreme Court's power of substantive constitutional review, but only after preserving the opportunity to do so by a wholly avoidable interpretation of a federal statute enabling him to reach the question of the statute's constitutionality.⁴⁸

United States v. Nixon has an uncanny kinship with *Marbury v. Madison* in this respect, although the substantive constitutional issue (of executive privilege) was of course by no means of the same importance. Just as in *Marbury*, in *United States v. Nixon* the Supreme Court would have had no occasion to expatiate on executive privilege had it not first resolved certain preliminary issues in a manner enabling it to discuss the substantive issue. And precisely because the Court resolved those preliminary issues as it did, devoting the majority of its opinion to the substantive question of executive privilege which therefore seems to be the main feature of the case, it is easy (even as it was in *Marbury*) to gloss over the preliminary and subsidiary points. Exactly as one is inclined to think the Court clearly correct on the main question (and to think it important that the Court was able to reach that question), he is also likely to be beguiled by the Court's treatment of the lesser points of law.

In *United States v. Nixon*, however, one of these lesser points

⁴⁵ *United States v. Burr*, 25 F. Cas. 187 (No. 14,692d) (C.C.D. Va. 1807).

⁴⁶ 345 U.S. 1 (1953).

⁴⁷ 5 U.S. (1 Cranch) 137 (1803).

⁴⁸ In *Marbury*, it was obvious that the Court could have construed the Act of Congress (§ 13 of the Judiciary Act of 1789) to authorize writs of mandamus only in cases on appeal or within the original jurisdiction of the Court. Had the Court construed the statute in this way, it would entirely have avoided any question as to whether Congress may authorize any cases to be brought originally in the Supreme Court apart from those specifically identified in article III of the Constitution. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14-16.

of law is far from trivial. The implications that may flow from its ready acceptance are independently serious. As a consequence, however satisfied one may be politically with the case—that the Court not only decided well and correctly on the question of executive privilege, but that it would have been regrettable had the Court cast the case out on some mere procedural ground—it would be academically faithless to ignore the difficulty.

That difficulty, in my view, is laid bare simply by asking, which of the following captions most accurately describes the point of controversy between the two parties? Was it in fact *United States v. Richard Nixon*, *Jaworski v. Nixon*, or *Nixon v. Nixon*? The point was raised by Mr. St. Clair, and we must look again at the adequacy of the Supreme Court's response:

[Mr. Jaworski's] point of view is [that] he views himself as the United States as distinguished from a member of the executive branch. And in his brief he invokes the United States as really a fourth entity. Constitutionally, a Special Prosecutor, with the power that my brother suggests he has, is a constitutional anomaly. We have only three branches, not three-and-a-third or three-and-half, or four. There is only one executive branch. And the executive power is vested in a President.⁴⁹

The objection which Mr. St. Clair was advancing in this portion of his oral argument was incorrectly characterized by the Supreme Court as one of "justiciability," as the Court captioned that part of its opinion that rejected the argument.⁵⁰ If Mr. St. Clair's point is viewed simply as an objection to "justiciability," it is difficult to fault the Court's response in the penultimate paragraph to this section of the opinion:

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." *United States v. ICC*, 337 U.S., at 430. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with

⁴⁹ Record, *supra* note 15, at 67 (argument of Mr. St. Clair).

⁵⁰ 94 S. Ct. at 3100-02.

his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power.⁵¹

Of course the *issue* was justiciable, but only if one abstracts "the" issue as though it were but an ordinary case where one party seeks the assistance of the court in the discovery of evidence in the custody of another who resists on some legal pretext.

In its concluding paragraph to the same section, the Court attempted once again to characterize the objection Mr. St. Clair was seeking to advance, this time as an objection to the Special Prosecutor's "standing."⁵² Again, if this characterization is allowed to pass, it is also difficult to fault the Court's response.

The authorization pursuant to which Mr. Jaworski applied for judicial assistance to secure evidence from a reluctant party quite clearly and emphatically empowered him to seek such assistance in the courts.⁵³ It was also correct (and utterly uncontested) that that delegation of executive power "remained operative," *i.e.*, that it had not been revoked.⁵⁴ It was equally clear (and equally uncontested) that no move had been made to remove Mr. Jaworski from the position of Special Prosecutor to which office the authority to seek such judicial assistance had been delegated. Consequently, there was no occasion to enter into any troubling discussion of whether, assuming the President and/or the Attorney General sought to fire Mr. Jaworski for any cause other than that for which the President and the Attorney General had previously provided, such discharge would have been ineffective.⁵⁵ Thus, authorization to seek assistance of the courts to secure evidence with respect to trials arising from the presidential election of 1972 was clear and uncontested. Since no claim had been made either that the authorization had been revoked or that Mr. Jaworski had himself been discharged, he of course had "standing."

But neither of these Supreme Court characterizations of the

⁵¹ *Id.* at 3102.

⁵² *Id.*

⁵³ 38 Fed. Reg. 32805 (1973).

⁵⁴ 94 S. Ct. at 3101-02. *Cf. Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

⁵⁵ *Cf. Weiner v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

issue even came close to the essential nature of Mr. St. Clair's objection. Only on page eight of the Court's opinion does the Court state the issue with approximate accuracy:

Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Wall. 454 (1869), *United States v. Cox*, 342 F.2d 167, 171 (CA5), cert. denied, 381 U.S. 935 (1965), it is contended that *a President's decision is final in determining what evidence is to be used in a given criminal case.*⁵⁶

This comes closer, but it is still inaccurate. Insofar as it describes the issue as being the supremacy of presidential authority with respect to the *use* of evidence in a given criminal case, it states the matter too weakly. Obviously the judiciary itself has a separate interest regarding the use of evidence in a given criminal case. Quite apart from determining matters of admissibility or excludability, a federal court might appropriately safeguard the judicial process from prosecutorial abuse even by the President, if the court were convinced that critical and admissible evidence had been withheld by the President to insure a verdict of "acquittal" which might otherwise be utterly unwarranted. The federal courts need not cooperate as an independent agency of whitewash.

But that question is not addressed in *United States v. Nixon*. Rather, the issue is whether "a President's decision is final" so far as a federal court is concerned with respect to *the degrees of assistance a federal court shall presume to provide in securing evidence solely on behalf of executive interests*, when it becomes manifest to the court that the President of the United States has personally concluded that the executive interest of the United States would not be well served by the issuance of process by the court, and when the President of the United States has communicated his view directly to the court itself. This is a different, far more difficult issue. It is not resolved by *any* of the cases relied upon by the Court.⁵⁷ Implicit in *United States v. Nixon* is a decision on

⁵⁶ 94 S. Ct. at 3100 (emphasis added).

⁵⁷ In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Supreme Court held that private rights may vest by force of an extant regulation, assuming even that no statute required the issuance of that regulation and that the regulation may at any moment be revoked. The same proposition is reaffirmed in *Vitarelli v. Seaton*, 359 U.S. 535 (1959) and *Service v. Dulles*, 354 U.S. 363 (1957). Neither of these cases in any way involved a controversy between conflicting assertions by the President of the United States and some other officer as to whose representation of a purely executive interest should be deemed controlling by the court in which such conflicting assertions were made.

In *United States v. I.C.C.*, 337 U.S. 426 (1949), the principle of presidential executive supremacy similarly had nothing to do with the case. In brief, the United States brought suit in district court seeking relief as a shipper of goods. Its complaint, brought by the Attorney General, was that the rates charged by a railroad were improper, and that the ICC had erred as a matter of law in its

this question, of course, but not a decision accompanied by a line of reasoning or explanation that can yield an abiding conviction that the decision was right.

The question is important because it involves a challenge to the supremacy of presidential authority in the determination of purely executive interests sought to be advanced through applications for judicial assistance over the contrary determination of lesser officials. Viewed in this manner, the Court's decision in *United States v. Nixon* may inadvertently support a proposition that Congress may divide up and "particle-ize" the executive power of the United States. I cannot believe that the Court meant to do so.

Among the specific executive powers enumerated in article II of the Constitution is that "he shall take care that the laws be faithfully executed."⁵⁸ The Supreme Court's reference to *United States v. Cox*⁵⁹ itself supports the view that the judiciary has no separate superintending authority as to what cases shall be brought by the executive, or what evidence shall be sought by the executive. The "he" referred to in article II is the President, a unitary office, deliberately selected to be unitary against alternative proposals advanced in Convention in 1787, and enacted into express language: "The executive Power shall be vested in a President"⁶⁰

administrative adjudication denying the government's claim and denying relief. The ICC appeared through its own counsel in defense of the Commission's judgment, and the railroad also appeared against the United States as intervenor. "Case or controversy" elements of article III thus being satisfied in every practical way, the Supreme Court held that the superficial anomaly that the Attorney General was also required by statute to appear nominally "for the Government as a statutory defendant," was neither a statutory nor article III bar to the suit. The case may well have been appropriate for the Supreme Court to cite in *United States v. Nixon* as a first step in determining the Special Prosecutor's "standing" to have applied for a subpoena, but it is without value as to whether his representation of an exclusively executive interest (*i.e.*, whether judicial assistance should be sought to secure evidence for a prosecutive use) may be preempted by the President of the United States, once the President himself makes a direct assertion in court as Chief Executive that that assistance by the court is not only not desired, but that he affirmatively opposes it. *United States v. I.C.C.* said nothing whatever, of course, as to whether the President of the United States might have authoritatively pre-empted the Attorney General in district court by entering an appearance on his own behalf, as Chief Executive, to move that the proceeding should be dismissed. Had he done so, the Court would then have had occasion to determine whether anything other than a purely executive interest was involved, a question not deemed necessary to consider at the time at all. The President had made no such assertion.

⁵⁸ U.S. CONST. art. II, § 1.

⁵⁹ 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

⁶⁰ The decision to establish a single, rather than plural executive was reached early in the deliberations of the Constitutional Convention. 1 RECORDS OF THE FEDERAL CONVENTION 64-97 (M. Farrand ed. 1911). See also C. WARREN, THE MAKING OF THE CONSTITUTION 1973-85 (1928). Commentaries by pro-

There is, however, no need to derive from this conventional wisdom the insufferable conclusion that no particle of the executive power can be delegated in whatever manner the President might choose, any more than it would be appropriate to suppose that Congress cannot delegate any particle of the legislative power to quasi independent regulatory agencies, with an authorized, albeit interstitial, rule-making power of their own. The point is not to revisit the delegation cases, but to distinguish them. Bearing in mind that "it is a constitution we are expounding,"⁶¹ it does not derogate from the function of a unitary executive power as it relates to the principle of presidential executive supremacy to suppose that the President may very well require the full-time assistance of other, subordinate officers for whom Congress may make provision and to whom the President may commit some portion of the executive power.⁶²

Constitution spokesmen during the ratification debates link the preference for a singular executive to a desire for energetic, responsible administration of the laws by an independent branch:

That unity is conducive to energy will not be disputed. Decision, activity, secrecy and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

THE FEDERALIST No. 70, at 472 (Cooke ed. 1961) (A. Hamilton). Subsequent reaffirmation of the unity principles may be found in the famous protest message of Andrew Jackson, 3 MESSAGES AND PAPERS OF THE PRESIDENTS 69, 79 (J. Richardson ed. 1896), and in *Myers v. United States*, 272 U.S. 52 (1926). These authorities, as qualified by later distinguishable judicial approval of administrative agencies, seem to support the view summarized by Professor Edward S. Corwin: "The Constitution knows only one executive power, that of the President whose duty to 'take care that the laws are faithfully executed' becomes the equivalent of the duty to execute them himself, according to his construction of them." E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 84 (2d ed. 1957).

⁶¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

⁶² *Cf. I.C.C. v. Brimson*, 154 U.S. 447 (1894), sustaining an act of Congress making it "the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act" *Id.* at 461. In his editorial in the *New York Times* Professor Bator comments:

Does this mean chaos, with no control over who may appear in court on behalf of the Government? Of course not. The authority of a given official to bring suit on behalf of the United States must be duly conferred by law. And the President can keep order through his constitutional prerogative to hire and fire.

P. Bator, *Disputing Mr. St. Clair on the Jurisdictional Issue*, *N.Y. Times*, May 30, 1974, at 37, col. 1 (city ed.) (emphasis added). There are several difficulties with this approach. The first is that it would preserve presidential supremacy over purely executive decisions only by the awkward device of *Myers v. United States*, i.e., by enacting the spoils systems into constitutional law, insofar as it implies that the President could not be denied an authority to dismiss a United States attorney since that is the one way he "can keep order."

It is too limited insofar as it would require the President to fire a U.S. attorney outright even when he does not wish to do so, and where it would be quite sufficient from the President's point of view to leave the U.S. attorney unmolested

It may be seriously questioned, however, whether Congress may particle-ize the executive power by attempting to lodge a power of *executive finality* in any such office or officer, *i.e.*, the power to determine what constitutes "the" executive interest of the United States, and a power to render that determination conclusive in any forum, foreign or domestic, *without regard to any contrary representation by the President of the United States of his own view of that executive interest*. No answer is provided by the fact that Congress may vest the power to appoint "inferior" executive officers outside the Presidency, by force of special constitutional provi-

in his position while being free to assert authoritatively in federal court his own authority as Chief Executive that, as President, he does not deem the executive interest to be advanced in a particular case through any assistance the federal court might otherwise be authorized to provide. The necessity of firing the U.S. attorney outright requires more of the President than the President's own view of the appropriate exercise of executive restraint even while forcing him to an extreme act which may be far more demoralizing to executive professionals and simultaneously inhibiting to the President by creating an unnecessary political controversy with Congress. It is likewise too drastic as the outright discharge of the U.S. attorney is clearly inessential to maintain the superordination of presidential authority in determining the extent to which judicial assistance shall be sought in behalf of exclusively executive interests. The *Myers* "remedy" of enacting the spoils system into constitutional law was rightly trimmed by *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

The other difficulty with this approach is that Professor Bator does not in fact believe in it. His view apparently is that even this one mode of executive superintendency may itself be cut off by the simple expedient of Congress vesting the power of appointment in some federal court, while simultaneously restricting the power of removal as Congress alone sees fit. *See, Hearings on H.J. Res. 784 & H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 18, at 334-38 (1973) (testimony of P. Bator), relying upon *Ex parte Siebold*, 100 U.S. 371 (1879). *See also United States v. Perkins*, 116 U.S. 483 (1886), noted by Chief Justice Taft in *Myers v. United States*, 272 U.S. 52, 126-27 (1926). *But see Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838):

[T]he proceeding has been treated as an infringement upon the executive department of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the Court of the case, is entirely misapplied. . . . The mandamus does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character

One additional, critical, distinction should be noted. Insofar as a regulatory agency is in significant part an agent of *Congress*, chosen by Congress as its means of perfecting Congress's own legislation, *i.e.*, promulgating rules that perfect Congress's legislative "intention" and to represent its will in establishing the exact legislative norm, it is not illogical that Congress may, pursuant to the necessary-and-proper clause, also provide that its legislative interest shall be represented by professional counsel attached to its own agency. From this point of view, the principle of presidential *executive* supremacy may not be a sufficient basis for the President to presume to pre-empt the agency's own counsel in court, at least where issues are present calling into question the consistency of the regulation with the authorization and intention of Congress. In that respect, the controversy is not "intra-departmental" at all, but inter-departmental. In *United States v. Nixon*, however, there is no suggestion that the interest which Mr. Jaworski was representing was anything other than a purely executive one.

sion,⁶³ or that it may, aided by that provision, secure to such officers some degree of tenure and professional security such officers might otherwise lack.⁶⁴ Indeed, acceptance of that clause may more logically imply that precisely to the extent that the authority to appoint and remove such persons may be placed outside the executive spoils system, derogating from the executive power to that salutary extent, it would be absurd to treat that clause as though it were an oblique and disingenuous way of also granting to Congress the wholly different and more ominous power to particle-ize the executive power by smuggling in a power of executive finality to be exercised by all such persons.

Moreover, *Myers v. United States*⁶⁵ may well be incorrect, as it is certainly debatable whether the Constitution enacted the spoils system, *i.e.*, reposed an ungovernable removal power in the President over *all* even purely executive offices, down through and below local postmasters. But while Congress may be able to provide tenure even for exclusively executive officers, at least at subcabinet levels of responsibility,⁶⁶ to preserve the separation of power it may be all the more necessary to hold that that power is wholly without prejudice to the President's power of executive supremacy in respect to the purely executive finality of their decisions. It is a contrived logic which confuses constitutional provisions respecting congressional power over appointments and removals with the principle of presidential supremacy in the final determination of purely executive interests. Wherever that logic is admitted, the argument becomes circular. If one insists that the power to provide for the appointment and removal of an "inferior" officer also carries with it the power to provide for the constitutional finality of any (article II) executive decision that such person may make, the officer is, to that extent, not an "inferior" officer at all—and thus the clause is inoperative.⁶⁷ Only to the extent that the supererogatory authority of the President of the United States is left free to assert itself (in any instance when the President resolves the proper use of article II in some manner contrary to the initial determination of another) can it fairly be said that, in respect to that power, the other person is truly an "inferior" officer.

This incidentally, is the principal objection to the several proposals to establish a "separate" office of Special Prosecutor

⁶³ U.S. CONST. art. II, § 2.

⁶⁴ *See, e.g.*, *United States v. Perkins*, 116 U.S. 483 (1886).

⁶⁵ 272 U.S. 52 (1926).

⁶⁶ *Id.* at 240 (Brandeis, J. dissenting).

⁶⁷ *See* discussion in note 62 *supra*.

with some power of article II executive finality.⁶⁸ That Congress may provide for such an office seems likely. That it can do more, *i.e.*, that it can also vest in such office a power of executive finality controlling in the courts against the President of the United States in any opposing assertions of what shall be deemed the authoritative expression of the purely executive (article II) interests of the United States, seems to me most doubtful.⁶⁹ Otherwise, I do not see any clear stopping point at all as to how far Congress may dismember the executive power, reducing the effective authority of the President personally to the chore that "he shall from time to time give to the Congress Information of the State of the Union," and placing every significant element of ex-

⁶⁸ Following the "Saturday Night Massacre," H.R. 11401 was introduced on November 12, 1973, to provide for appointment of a Special Prosecutor by a three-judge panel of the United States District Court for the District of Columbia. Pursuant to the proposed resolution, the Special Prosecutor would have had "exclusive jurisdiction to investigate and to prosecute in the name of the United States . . . all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility," and "allegations of offenses involving the President, [and] members of the White House staff, or Presidential appointees." The Special Prosecutor's proposed term was to be three years, subject only to "the sole and exclusive power" of the appointing judicial panel to remove him. See, *Hearings on H.J. Res. 784 & H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 18, at 487-96 (1973).

Nearly all of the debate on this Resolution was highly tangential, however, because it was preoccupied with the task of assuring job security to the Special Prosecutor, rather than being concerned with the executive finality of such decisions as he would be expected to make in the exercise of purely executive power. Thus, the debate largely centered on the question of whether the office of Special Prosecutor was (in light of his proposed responsibilities) an "inferior" office within the meaning of article II, section 2, clause 2, which permits Congress to vest the appointment (and removal) of "such inferior officers" outside the Presidency. Additionally, the question was debated as to whether (assuming the proposed office would be an inferior one), the power of appointment (and removal) could be vested "in the courts of law" (namely, the United States District Court for the District of Columbia) rather than in "the heads of departments" (namely, the Attorney General as head of the Department of Justice), even though the office would be an executive one, rather than a judicial one.

Interesting as these questions were, they did not reach the very different and far more central issue. That issue is simply whether there is anything anywhere in the Constitution which grants the Congress the power to assign to any such officer an additional and extraordinary authority of *executive finality* in exclusion of the unitary superordinate executive authority of the President. Article II, section 2, clause 2 does not on its face purport to say anything to that effect at all, of course. Nor can one find anything in the very modest original convention discussion of this clause (or in its own structure and relationship to other clauses) that does so.

⁶⁹ Most helpful on this question are the views of Professors Freund and Bator, and of Dean Cramton. See, *Hearings on the Special Prosecutor Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 1, at 345 (1973) (testimony of P. Freund); *id.* at 356-57 (testimony of R. Cramton). See also *Hearings on H.J. Res. 784 & H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 18, at 335 (1973) (testimony of P. Bator).

executive power in the hands of individuals made more accountable to Congress (or to the courts, or to no one at all) but in any event in clear derogation of executive presidential supremacy. Support for the effort was urged in committee hearings on the maxim that "we do well to remember that it is a Constitution we are expounding."⁷⁰ Possibly, but not, I think, the one we have.

In spite of the understandable alarm so recently expressed about the growth of presidential power,⁷¹ however, *United States v. Nixon* ought not be regarded as a precedent in derogation of the principle of presidential executive supremacy. The opinion for the Court did not address the issue as such, and neither set of briefs clearly framed the issue in these terms. The issue was buried and lost, subsumed in the mere determination of the Special Prosecutor's standing to sue and the justiciability of his claim.

Having established to its satisfaction that the Special Prosecutor did have standing and that the issue was justiciable, the Court lapsed into the error of treating the President merely as any other adversary resisting a subpoena *duces tecum*, albeit on grounds peculiar to him as President, *i.e.*, executive privilege. What it omitted to do (as the district court failed also to do) was to raise the question in the following way: When the President of the United States authoritatively communicates to a federal district court that in his view the issuance of judicial process is not desired on behalf of any executive interest of the United States, is it not obvious that his determination as Chief Executive necessarily supercedes any contrary assertion by any other party when the only basis claimed for issuance of that process is an asserted executive function?

Adherence to the principle of presidential executive supremacy does not require that the President be prohibited from freely delegating portions of the executive power to such offices and officers as Congress may provide. Rather, the principle is preserved intact simply in observing that at every moment presidential executive supremacy still operates with respect to all portions of the executive power thus delegated. Without presuming to discharge such officers, moreover, and without presuming to revoke their general authority (neither of which may be constitutionally desirable to imagine as the sole means of preserving presidential executive supremacy, and both of which the Congress may in some measure restrict), the President may at any time declare his own view of the executive interest which thereby becomes con-

⁷⁰ *Id.*

⁷¹ See, *e.g.*, A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

trolling in court, in foreign relations, or in any other forum where the question might arise.⁷²

Is there, then, no check at all upon the President for great abuses he may make of that power? But of course. The House and the Senate may satisfy themselves that the President's executive determination of the best interests of the United States was influenced by motives or purposes so corrupt and reprehensible—or that his supererogatory assertion of executive supremacy constituted so gross an abuse of his own power—that they are exactly what the Constitution meant for Congress to police through its powers of impeachment and removal. The Constitution, however, nowhere appears to commit to Congress the very different power to avoid the President's paramount executive authority so long as he remains Chief Executive, by presuming to find it "unsatisfactory" and thereupon taking it from him, to place it in another.

On balance, I believe that while Mr. Jaworski was entitled (by statute) to utilize the name of "The United States" in seeking the subpoenas, insofar as the sole interest of the United States he had standing to advance was purely an executive one, the case in fact was *Jaworski v. Nixon*, the issue was "who is constitutionally superior in the controlling representation of a purely executive interest in the federal courts," and ironically, on the merits of that question the President had all the better of it.

⁷² Insofar as *United States v. Nixon* may (implicitly?) hold that the only means by which a President may constitutionally assert his executive supremacy in the courts is by first either firing the officer with whom he disagrees, or by first revoking his authority, I can only suggest, respectfully, that the Court is incorrect. But it is far more likely that the Court simply was never encouraged to see the issue correctly in the first place.

What made it hard to see was the peculiarity that the substance of the President's assertion of superior executive determination (as to whether, in his view, any appropriate executive interest of the United States would be served by issuance of district court process) was obscured by its form. The objection was not forthrightly put in these terms. Rather, the President appeared to be contesting issuance of process solely as an adversary (rather than as an executive superior), and solely on the different ground of "executive privilege." Like the Court, some commentators also assumed, therefore, that the President's power of executive supremacy simply went "unexercised." See, e.g., Albert & Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski's Authority*, 74 COLUM. L. REV. 545, 550-52 (1974).

But an examination of the executive privilege claim itself should have made plain to the court that it was intrinsic to the claim that, in the President's view, the executive interests of the United States would be better served by not issuing process for the materials, than by issuing that process. It was therefore not at all as though the President had merely made some public speech to that effect. Rather, through counsel, in court, formally, the President had expressed his will directly. Cf. Albert & Simon *supra*.